APPENDIX E:
ADDITIONAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURES ACT AND THE WASHINGTON SAFETY AND HEALTH ACT

Analysis of alternatives to rulemaking (RCW 34.05.328(1b))

L&I considered four primary non-rulemaking alternatives.

- Expanding voluntary ergonomics activities, including increased technical assistance to employers and increased educational efforts;
- Using existing regulations more often and with clearer enforcement policies;
- Relying upon market forces, tort law or workers' compensation incentives; and
- Waiting for federal OSHA to promulgate an ergonomics rule.

Expanding voluntary efforts

The department has been working with employers and others on voluntary efforts to reduce WMSDs for over 10 years. Since the 1980s, L&I has provided information and technical assistance to employers to help control WMSD hazards. During this same period, numerous private companies, consultants, safety and health journals, safety and health professionals, labor unions, trade associations and others have also encouraged and assisted employers in the voluntary use of ergonomics to eliminate or reduce risk factors leading to WMSDs. L&I efforts to encourage voluntary control of these hazards have included

- Hiring professional ergonomists to conduct research and assist employers;
- Working with employers and employees to develop guidelines on workplace ergonomics such as "Ergonomic Program Guidelines," "Office Ergonomics Guidelines" and "Lessons For Lifting and Moving Materials";
- Providing free employer workshops on industrial and office ergonomics;
- Publishing statistics on WMSDs from state workers' compensation data;
- Providing training to L&I staff on workplace ergonomics;
- Conducting research studies in various industries on workplace ergonomics, focusing on identifying and controlling hazards, such as "Work Related Musculoskeletal Disorders at an Aluminum Reduction Mill (SHARP 1997);
- Developing industry-wide initiatives to promote the reduction of risk factors for WMSDs, such as the "Zero Lift" program in the nursing home industry;
- Developing and maintaining an ergonomics web site;
- Providing access to free ergonomics training and information videos; and
- Highlighting ergonomics and reduction of WMSD hazards at the annual Washington State Governor's Safety and Health Conference

The presumption behind voluntary technical assistance and educational programs is that they provide motivation or incentives for employers to reduce hazards. There is evidence, however, that this is not always the case. There are a number of studies showing that education or training alone, in the absence of specific employer commitments to make improvements in the workplace, is not particularly effective in reducing WMSDs (Daltroy et al. 1997; SHARP 1993).

After ten years of offering these resources, L&I surveyed approximately 5000 employers, including all industry sectors in the state other than mining and maritime (Foley and Silverstein 1999). A stratified, random sampling strategy and a high response rate ensured that the survey was representative of all state employers. The survey found that while WMSD risks were prevalent in all industry types and sizes of workplaces these risks are not being addressed by many businesses. Sixty percent still report no efforts to control WMSD hazards, although 90 percent of firms reported having employees exposed to some workplace risk factors. Even among employers who said they had WMSDs occur in their workplaces over the last 3 years, almost 40 percent reported they were taking no steps to prevent them.

The employer survey also found that the one-third of employers who had taken steps to prevent or reduce WMSDs generally reported that their actions were successful. Many of these employers reported that steps to reduce WMSDs resulted in benefits beyond a reduction in the number or severity of problems. These benefits included improved product or service quality, improved morale, and reduced absenteeism. However, many employers who made efforts to control WMSD hazards chose relatively less effective methods such as use of personal protective equipment.

L&I considered expanding these voluntary efforts instead of promulgating a rule, but decided for three reasons that this would not be as effective as a rule.

- First, voluntary efforts do not provide equal protection for all employees at risk. There is strong evidence that after ten years of voluntary efforts in the absence of a rule, significant numbers of employers have still not voluntarily take actions necessary to protect employees from hazards causing WMSDs. L&I believes that increased training, education, technical assistance, and pilot projects would be useful and would encourage some additional employers to address WMSDs but that significant numbers of employees would still go unprotected.

- Second, over time, additional voluntary programs are likely to have diminishing results as the most resistant employers make up a higher and higher proportion of the target population. For example, those who believe they gain a competitive advantage by avoiding short-term investments in workplace safety are not likely to take advantage of voluntary programs. Without a rule there is little way the department can induce or motivate these employers to take protective measures.

- Third, WMSD claims rates have declined during the 1990's in the absence of a rule, but the WMSDs rates have declined more slowly than for other types of workers' compensation claims and the proportion of all claims represented by WMSDs has increased. Moreover, the rate of decline in WMSDs has slowed considerably in the past few years and in several important industry groups and for some types of WMSDs the rates have flattened completely or actually increased.

  - Among State Fund employers, there was a 28% drop in WMSD rates from 1992 to 1997 (Silverstein, Viikari-Juntura and Kalat 2000). From 1992 to 1995 the rate declined 7.4% per year, but from 1995 to 1997 the rate declined only 3.98% per year.
  - Among self-insured employers the overall decline from 1992 to 1997 was 11.23%. From 1992 to 1995 the annual decline was 3.7%, but from 1995 to 1997 there was only a negligible decline of only 0.08% per year.
  - This recent flattening of WMSD rates is even more pronounced in several of the highest risk industries. For example, among State Fund masonry employers the WMSD rate dropped 6.6% per year from 1992 to 1995 and only 2.6% per year from1995 to 1997. The comparable annual rate changes were 6.4% and 3.8% for roofing and 9.0% and 4.1% in sawmills.
  - For some high-risk State Fund employer groups such as carpentry, residential construction, and local transit the rates increased from 1995 to 1997. Rates also increased from 1995 to 1997 for some high-risk self insured employer groups such as sawmills, trucking and courier services, and air transport.
  - For State Fund grocery stores and nursing homes the WMSD rates declined more consistently throughout the entire period. Among self-insured grocery stores and nursing homes, however, the declining rates from 1992 to 1995 slowed considerably from 1995 to 1997.

  Thus, despite some positive trends, the pace of improvement has slowed and WMSDs still account for unacceptably high numbers of claims and very high claim costs. L&I seeks sustained or increased improvement rather than a continuation of recent trends and believes that this is not possible without the additional stimulation provided by a rule, particularly with regard to those employers who are most resistant to voluntary approaches.

Some employers suggested that L&I establish a workers' compensation rate discount program for employers who voluntarily establish ergonomics programs as an alternative to rulemaking. L&I believes that such programs provide effective non-regulatory incentives in some situations. In fact, the department established such a premium refund program in 1997 for nursing homes that agree to establish "zero lift" programs to reduce neck and shoulder injuries, and L&I plans to evaluate expanded use of such incentives in the future. However, L&I believes that such incentive programs cannot serve as across the board substitutes for a rule because they are limited to specifically identified measures that require immediate capital investments.

The workers' compensation system, which is experience rated, already provides an incentive for reducing workers' compensation costs. Employers who establish voluntary ergonomics programs are, in fact, often motivated by workers' compensation premiums and have reported considerable success in reducing their costs. Unfortunately, this existing economic incentive has only limited impact in dealing with transient employment and long term exposures and has proven inadequate to resolve the problem in all workplaces. Changing the manner in which the incentive is provided is not likely to prove effective outside limited and carefully defined situations. Similarly, preferred worker and second injury fund programs provide useful and worthwhile incentives to return injured workers to useful employment. They do not, however, provide incentives to prevent injuries before they occur by eliminating risk factors, and they therefore would not provide a meaningful alternative to the rule.

Using existing rules

L&I also determined that relying on existing regulations to address WMSD hazards would be an inadequate alternative to rule making. Existing general rules such as the Accident Prevention Program standard (WAC 296-24-040), Management's Responsibility (WAC 296-24-020) and the Safeplace Standards (WAC 296-24-073) do establish an obligation for employers to address recognized hazards that can cause WMSDs. These have been used as the basis for WISHA inspections and consultation visits in the past. However, these general regulations do not provide employers, employees or L&I staff with clear enough direction regarding which exposures must be controlled, what control measures must be implemented, or how the department will assess compliance. They only require an employer to take some unspecified actions to address hazards. Therefore they have not been used often.

The safeplace standard (or general duty clause) requires a case-by-case determination that hazards are recognized and that specific feasible controls are known. Because of this high standard of proof, it typically is cited only in response to a pattern of injuries that have already occurred. This approach to enforcement therefore tends to be reactive instead of preventive. It is also inherently inefficient insofar as the same issues of recognition and abatement must be proven over and over again. Moreover, employers have little way to know whether they are in compliance before an inspection occurs.

Because these general rules are difficult for employers to apply and unwieldy for L&I to enforce they have not been effective tools for ensuring equal protection for all employees at risk for WMSDs. Also, because compliance is so inconsistent and enforcement so limited, employers who invest in reducing WMSD hazards may be at a short term competitive disadvantage with employers who choose not to comply. L&I believe that a rule will provide more uniform employee protection and more equitable employer impact.

Business organizations have strongly resisted past L&I enforcement efforts, as well as efforts to ensure consistency by establishing agency policies to use existing rules in more

specific ways to address WMSD hazards. They have argued that this would be *de facto* rulemaking and that if the agency intends to use its authority to require employers to reduce WMSD hazards it must issue new, more specific rules through rule making.[1]

Several individuals asked for clarification about how L&I will use this combination of standards once the ergonomics rule is in effect. Because the ergonomics standard will be the most specific applicable standard, L&I will not issue violations for the risk factors covered by the standard under either the accident prevention program or safe place standards.

Relying upon market forces, tort law or workers' compensation incentives

Neither the market, tort law, nor workers' compensation provide adequate incentives for employers voluntarily to reduce WMSDs sufficiently in their workplaces without government intervention. Employers will generally act to prevent workplace injuries and illnesses when the costs of doing so are less than the anticipated costs of regulation. (Shapiro and Rabinowitz 2000) Workers' compensation is designed to insulate employers from bearing the full costs of work-related injuries and illnesses. Employers bear a fraction of the costs of injuries and a substantially smaller proportion of the costs of occupational illnesses. (Shroeder and Shapiro 1984) Some experts argue that experience rating creates an incentive for employers to prevent injuries. Even if this were true – and little empirical evidence exists to support the theory – it would not be likely to induce voluntary action to prevent chronic risks. (Spieler 1994) This is particularly true in Washington because the costs of occupational diseases are not fully reflected by an employer's experience rating. For these reasons, employers lack sufficient economic incentives to prevent WMSDs adequately in the absence of regulation.

Waiting for the federal government

Another alternative to rule making is waiting for the federal government to promulgate rules on ergonomics. This alternative was rejected for two reasons. First, Washington has the opportunity to fashion a rule that reflects the input of Washington State employers and employees and takes into account specific features of the state's worker compensation system, safety and health system, and industry demographics. Washington has previously used the authority delegated by Congress to develop creative state approaches to occupational safety and health rules that are tailored for Washington workplaces. Second, waiting for OSHA is unpredictable. OSHA rules often take many years to complete. OSHA was petitioned for a lockout/tagout standard in 1979 and published a final rule in 1989. OSHA initiated rulemaking for respiratory protection in 1982 and published a final rule in 1998. OSHA was petitioned for a tuberculosis

[1] When L&I initiated this rulemaking the Association of Washington Business reported that "In a major policy shift, Department of Labor and Industries Director Gary Moore announced the department would not use informal documents to enforce ergonomics standards. The department will put the issue of ergonomics before the public through the rulemaking process. 'This is a victory for Washington's employers,' AWB's regulatory reform manager Amber Balch said." Washington Business, Vol. 35, No. 6, July 29, 1998.

standard in 1992, issued a proposal in 1997, held hearings in 1998 and has not yet published a final rule. OSHA was first petitioned for an indoor air quality rule in 1987, issued a proposal and held hearings in 1994 and has not yet published a final rule. This history suggests that a final ergonomics rule may be years away. Waiting would mean more Washington workers will suffer painful, disabling WMSDs that could be prevented.

Several witnesses suggested that differences between this rule and a federal rule issued in the future might burden interstate commerce. Others suggested this rule might not be viewed "at least as effective as" any future federal rule. L&I cannot predict when a federal rule will be issued or its content. Until a final rule is issued, these concerns are premature.

Determination that the final rule is the least burdensome alternative for those required to comply that will achieve the general goals and specific statutory objectives (RCW 34.05.328(1d))

L&I considered the following non-rulemaking alternatives to the final rule:

- Expanding voluntary ergonomics activities, including increased technical assistance to employers and increased educational efforts;
- Using existing regulations more often and with clearer enforcement policies;
- Relying upon market forces, tort law or workers' compensation incentives; and
- Waiting for federal OSHA to promulgate an ergonomics rule

As described above, the non-rulemaking alternatives were rejected because L&I concluded they would not achieve the general goals and specific objectives of the Washington Industrial and Safety and Health Act. It is not necessary, therefore, to determine whether they would be less burdensome ways to achieve the general goals and objectives.

L&I considered the following rulemaking alternatives to the final rule:

- A flexible performance based rule requiring all workplaces to have a comprehensive ergonomics program
- A specification based rule requiring all workplaces to use identical approaches and methods to find and fix hazards
- An injury-triggered rule
- A rule covering additional hazards associated with WMSDs, including whole body vibration, pushing and pulling, and psychosocial stresses
- A rule including medical management and wage replacement
- A rule exempting small businesses
- A rule exempting specific industries such as agriculture, construction and maritime

As described above, these rulemaking alternatives were rejected because L&I concluded they would be significantly less effective than the final rule. The department also believes they would be more burdensome. A flexible, performance based rule would require all employers to develop their own methods and criteria for analyzing jobs and

identifying hazards, thereby unnecessarily burdening those employers, particularly smaller employers with limited resources and expertise, who would prefer that the department provide specific criteria. A specification based rule would require all employers to use the same criteria and methods, thereby unnecessarily burdening those employers who would prefer the flexibility to develop and use methods and criteria that are more efficient and effective for their particular circumstances. An injury-triggered rule is more burdensome than a hazard based rule because fewer injuries and the costs associated with them are prevented. A rule covering additional hazards would impose the additional burdens associated with complex methods and techniques for identifying and measuring exposures, in some cases requiring expensive instrumentation. A hazard based rule including medical management and wage replacement would add cost without further reducing hazards or preventing injuries. Rules exempting small businesses or those in particular industries would result in continued high injury rates and costs in the exempted workplaces without the benefits associated with coverage under the rule.

Based on these considerations L&I concluded that the rule is reasonable and responds to concerns identified in the public process. L&I also concluded that the rule is the least burdensome alternative that will meet the statutory mandate to assure that no employee will suffer material impairment of health or functional capacity for the period of their working life. The rule will be economically and technologically feasible. The department believes that the benefits of the rule will better outweigh costs than other alternatives.

Consequences of not adopting the rule (RCW 34.05.328(1b))

If a rule is not adopted as part of a comprehensive strategy, the pain, disability and costs of WMSDs will either continue unchanged or decline too slowly. WMSD claims rates have declined during the 1990's in the absence of a rule. However, the rate of decline in WMSDs has slowed considerably in the past few years and in several important industry groups and for some types of WMSDs the rates have flattened completely or actually increased (details above). Thus, despite some positive trends, the pace of improvement has slowed and WMSDs still account for unacceptably high numbers of claims and very high claim costs. The direct medical and time loss costs alone will continue to exceed hundreds of millions of dollars each year. L&I seeks sustained or increased improvement rather than a continuation of recent trends and believes that this is not possible without the additional stimulation provided by a rule, particularly with regard to those employers who are most resistant to voluntary approaches.

L&I's survey of 5000 employers (details above) found that while WMSD risks were prevalent in all industry types and sizes of workplaces these risks are not being addressed by many businesses. Sixty percent still report no efforts to control WMSD hazards, although 90 percent of firms reported having employees exposed to some workplace risk factors. Even among employers who said they had WMSDs occur in their workplaces over the last 3 years, almost 40 percent reported they were taking no steps to prevent them. Many factors contribute to the uneven distribution of voluntary ergonomic efforts. For example, there will always be disincentives for employers who want to take voluntary action to protect employees if short-term costs place them at an immediate

competitive disadvantage with others who do not take action, even if the benefits eventually far exceed costs. Without a rule, employees not working for employers who voluntarily adopt ergonomic protections will unfairly remain at higher risk. All employees will not be afforded equal protection from recognized workplace hazards. The department will not be able to address adequately the statutory objective of RCW 49.17 to assure that no employee will suffer material impairment of health or functional capacity for the period of their working life.

Analysis of pilot rulemaking and negotiated rulemaking (RCW 34.05.310)

The Washington Administrative Procedures Act encourages regulatory agencies to "develop and use new procedures for reaching agreement among interested parties before publication of notice and the adoption hearing on a proposed rule." (RCW 34.05.310) More specifically, "An agency must make a determination whether negotiated rule making, pilot rule making, or another process for generating participation from interested parties prior to development of the rule is appropriate."

L&I used a highly open and inclusive process for generating participation that included public rule development conferences and advisory committees. Before proceeding to public hearings the department concluded that these rule development conferences and advisory committees had effectively and appropriately provided a much higher than usual degree of public involvement. Although it became clear that full consensus among the multiple interested parties was not achievable, the process did successfully identify many shared ideas about possible regulatory measures that would make effective public policy and many others that would be poor policy and should be avoided. The department concluded that this represented the maximum amount of pre-proposal agreement possible and the department relied heavily upon these ideas in developing its proposal (Table 6).

Negotiated rulemaking was considered and rejected for two reasons. First, negotiated rulemaking is discretionary and the process of rule development conferences and advisory committees was an appropriate and effective alternative. Second, negotiated rulemaking is best suited to public policy issues involving a limited, easily identifiable group of affected parties who are reasonably likely to achieve consensus. The Negotiated Rulemaking Sourcebook, Administrative Conference of the United States[2] describes two key prerequisites for successful negotiated rulemaking: a limited number of identifiable interests affected by the rule and a reasonable likelihood that consensus can be reached.[3] The department concluded that the issue of ergonomics affected too many parties with too widely divergent views to suggest a negotiated rulemaking would be likely to succeed.

[2] 37 GPO 1990

[3] The federal Negotiated Rulemaking Act (5 USC 561 et seq) requires regulatory agency heads to consider whether "there are a limited number of identifiable interest that will be significantly affected by the rule… there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time."

Pilot rulemaking was considered and rejected for four reasons. First, pilot rulemaking is discretionary and the process of rule development conferences and advisory committees was an appropriate and effective alternative. Second, pilot rulemaking is best suited to situations where an agency intends to issue a highly specific, inflexible and experimental regulation and feasibility of compliance is highly uncertain. In this case, however, the department decided to move ahead with a proposal which was highly performance oriented, included flexible choices for compliance, was based on sound scientific principles and data, and incorporated the notion of feasibility as a self-limiting factor. L&I concluded that a rule designed in this manner would not benefit from pilot testing. Third, the department decided to incorporate a six-year phase-in period that would allow business, labor and government to work together after rule adoption on demonstration projects for administering the rule and achieving its goals. Fourth, over the past 10 years individual companies, trade associations, unions and others have undertaken a wide variety of pilot ergonomics projects. Examples in the rulemaking file include

- Ergonomics and the Newspaper Industry, a program established by the Newspaper Association of America to reduce WMSDs after a five year pilot project with the University of Iowa
- Ergonomics For Carpenters, a practical guide for reducing hazards on construction sites developed by the United Brotherhood of Carpenters in partnership with a business-labor focus group
- Ergonomic Safety Efforts at Port Townsend Paper Corporation, an employer program based on five years of pilot activities which reduced the annual cost of injuries 30-50% and lost work days by 500%
- Joint labor-management ergonomics programs in the automobile industry developed after years of pilot efforts by Ford Motor Company, General Motors and Daimler-Chrysler each working together with the United Automobile Workers
- Ergonomic Improvement of Scanning Checkstand Designs, a guide from the Food Marketing Institute that "represents the collective wisdom of a number of FMI member food retailers, equipment manufacturers and suppliers"
- A series of case studies from CTD News describing successful ergonomics activities at such companies as 3M, John Deere, The New York Times, Eastman Chemical and Red Wing Shoes
- Industrial Musculoskeletal Injury Reduction Program, a joint effort of the Council of Forest Industries and the Industrial Wood and Allied Workers to assist sawmills in complying with the British Columbia ergonomics rule
- Implementing Ergonomics in Small Mills, describing a successful program in Tigard, Oregon that is very similar to this rule
- Practical Ergonomics, a successful five-year pilot program in a Georgia Pacific plant that reduced injuries "while improving worker efficiency, product quality and productivity"

The rule draws from the experience of these efforts and L&I has concluded that further pilot programs are not necessary.

Determination that the rule does not require actions that violate requirements of other federal or state laws (RCW 34.05.328(1e))

The department has concluded that this rule does not require employers to violate any federal or state law. Several comments suggested that the rule conflicts with other requirements, or would adversely affect an employer's ability to comply with various state and federal laws. L&I has evaluated these claims and believes the rule will not require actions that violate federal or state law.

Some comments suggest a potential conflict with the Americans with Disabilities Act (ADA). The ADA requires employers to reasonably accommodate qualified individuals with a disability. This rule poses no conflict with the ADA. The rule is intended to prevent disability from occurring in the first instance. It does not address an employer's responsibility to accommodate following a disability. Overwhelmingly, workers exposed to hazards above the levels in Appendix B are not disabled within the meaning of the ADA. For the few that are, the duty to provide reasonable accommodation is consistent with, and may be more extensive than, the compliance duty imposed by this rule.

Some comments also suggested the rule will interfere with workers' compensation. The rule does not change the way that claims are adjudicated. It leaves the workers' compensation statutory scheme wholly intact, so no legal conflict exists.[4] The Department will not use the rule itself or the fact that there is or is not a "caution zone" or hazardous job in the workplace as the basis for allowing or rejecting a claim. The Department will continue to consider evidence about exposure to risk factors such as those that are included in the rule when making determinations of whether a worker has a medical condition that qualifies as a workplace injury or occupational disease as defined by law. This would be true regardless of whether a rule goes into effect or not.

Some individuals also raised concerns about potential conflicts with state and federal employment standards regulations. This rule is modeled on typical health standards. In a large number of health-related standards that rely on time-weighted averages (such as the hearing conservation standard), employers often have the option of administrative controls that include more frequent breaks or job rotation. Certain other standards (such as the wildland firefighting requirements in the firefighter standard) require more frequent breaks during hazardous activities. In such cases, compliance with safety regulations may exceed employment standards requirements (which allow compensation in lieu of otherwise required breaks). However, there is no conflict between the regulations.

Nor does the rule conflict with the National labor Relations Act (NLRA). It relies upon existing safety committee and safety meeting requirements, which do not themselves conflict with the NLRA. Providing information to a safety committee is not "dealing with" the committee as the NLRB has interpreted the phrase. Therefore, the requirement

[4] See, *United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980).*

to provide information does not conflict with section 8(a)(2) of the NLRA. Further, nothing in this rule mandates the form of employee involvement. Many methods of employee participation may be implemented consistent with the NLRA. So long as the employer does not dominate the employee safety committee, no violation of section 8(a)(2) exists.

Determination that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law (RCW 34.05.328(1f))

The WISHAct and rules adopted under it apply to local and state government employers, as well as to private employers (RCW 49.17.020(3)). The rule makes no distinction between public or private employers and the requirements are based on the presence of identified risk factors without regard to the public or private nature of the employer.

Determination whether the rule differs from any federal regulation or statute applicable to the same activity or subject matter (RCW 34.05.328(1g))

No federal rule or statute regulates worker exposure to risk factors associated with an increased incidence of WMSDs.

Rule implementation plan (RCW 34.05.328.2)

How will L&I implement and enforce the ergonomics rule, including a description of resources?

The ergonomics rule includes a detailed implementation schedule. A long phase-in period is provided, allowing a full 3 to 6 years for employers to come into compliance.
Four distinct employer groups are identified. Large employers (more than 50 full-time equivalents) in the twelve highest-risk industries based on numbers and rates of accepted workers' compensation claims must comply first. These employers are allowed two full years of voluntary activities before compliance with the awareness education and hazard analysis requirements. This group would have an additional year to implement hazard reduction measures. L&I is included in the first group, although the agency is not in one of the high-risk industries.

The second group, the rest of the employers in the twelve high-risk industries as well as the rest of the large employers (more than 50 FTEs), have 3 years of voluntary activities before partial compliance with the rule and 4 full years before full compliance.

The third group, employers with 11-49 FTEs (who are not in the twelve highest-risk industries), have 4 years of voluntary activities before partial compliance and 5 full years before full compliance.

The fourth group, small employers (who are not in the twelve highest-risk industries) with ten or fewer FTEs, have 5 years of voluntary activities before partial compliance and 6 full years before full compliance.

A supplemental implementation schedule allows new businesses that are covered by the rule (after the initial implementation timeline has expired) a full year to come into partial compliance (awareness education and hazard analysis) and 15 months to be in full compliance. Finally, businesses who make significant changes to their workplace (after the initial implementation timeline has expired) have several months to come into compliance with the rule requirements.

All regional customer service representatives and consultants in vocational services, risk management, therapy, and safety and health programs will receive training on the new rule so they will be prepared to assist employer and employee groups. Four professional ergonomists in the department will provide full-time assistance to regional staff. In addition, five other professional ergonomists in the department's SHARP program will work on best practices and conduct research on controls and evaluation of the rule's effectiveness.

The department expects to commit additional agency resources and more efficiently coordinate existing resources to assist with ergonomics consultation. The goal is to provide additional high quality workplace ergonomics consultation services, focusing more on industry-specific outreach and training materials than has been the past experience for WISHA rules.

Enforcement will not begin for over two years after the rule is adopted. When enforcement begins, the department will utilize existing safety and health compliance officers in the department's six regional offices. These compliance officers currently enforce other WISHA safety and health rules. Compliance officers will be trained by central office ergonomists and policy staff to enforce the rule. Existing citation penalty structures and other standard compliance protocols documented in the WISHA compliance manual will remain unchanged, however a specific ergonomics inspection protocol will be developed and tested. L&I will work with employer and employee groups to develop these ergonomics inspection policies and procedures. L&I will also communicate the policies and procedures to employers and employees insofar as this is reasonably possible before enforcement begins. In addition, the department will also seek the advice of the business/labor WISHA Advisory Committee about how best to work with employers and employees to develop these inspection policies and procedures.

Construction employers raised concerns about how L&I would enforce a general or upper-tier contractor’s responsibility for the health and safety of a subcontractor’s employees (generally known as “parallel citations” or “*Stute* citations” based on the leading liability case, *Stute v. PBMC*). In order to eliminate any confusion, the department will not hold a general or upper-tier contractor responsible for violations related to a subcontractor’s employees until the rule is fully in effect for all employers.

In relation to other multi-employer worksites, the general principles for determining appropriate health and safety responsibility will remain in effect. The employer who controls the worksite is generally responsible for physical hazards at the work site, while the employer of record is generally responsible for training and personal protective equipment.

How will L&I inform and educate persons affected by the ergonomics rule?

An initial mailing providing copies of the rule and/or other information will be sent to approximately 10,000 individuals and businesses. This includes:

- All individuals who submitted oral or written comments during the public hearings as well as the WISHA Advisory Committee, the Construction Advisory Committee and those who served on the two Ergonomics Rule Making Advisory Committees;
- All individuals who attended public hearings but did not submit testimony;
- A large list of individuals who have identified an interest in the rule making over the last two years;
- Individuals on the department's mailing lists for safety and health standards; and
- A list of business and labor associations located across the state.

In addition, the department will inform newspaper, television, and radio media across the state about the rule. A copy of the rule and additional information will also be posted on the WISHA ergonomics website (www.lni.wa.gov/wisha/ergo) for immediate access and downloading via the Internet. Finally, copies of the rules and associated information will be available in L&I regional offices across the state.

Shortly after the rule is adopted, affected employer and employee groups will be able to attend detailed presentations on the new rule by regional L&I consultants. Copies of the presentation materials and other handouts will be available and questions about the rule will be addressed. These presentations will serve to educate affected individuals about the rule and help them get started in complying. The long phase-in will allow time for employers and employees to find out about the rule, understand the requirements, and meet the requirements before enforcement begins.

Materials for employers and employees will also be posted on the WISHA ergonomics website (www.lni.wa.gov/wisha/ergo) shortly after the rule is adopted and will be continually updated. This will include a summary of the rule requirements, a copy of the rule, answers to frequently asked questions, how to get started, and where to go for help or additional information. Existing L&I workplace ergonomics materials will be updated or revised to include information regarding the new rule.

Regional L&I consultants will be trained to provide on-site employer assistance, if requested, as a follow-up to the presentations on the rule. New free workshops tailored to different industry sectors will be developed and offered to further assist. In addition, professional L&I ergonomists will be available to work with the regional L&I consultants to provide help for employers and employees.

The department has already started to work with employers, employees and health professionals to develop model ergonomics awareness education materials. L&I plans to make model basic awareness education materials widely available to employers who wish to use them in complying with the rule. Other guidelines, checklists, and help materials will be developed during the phase-in period. The WISHA Advisory Committee will be asked for advice on what guides and models would be best to develop and how to include employer and employee groups in developing them.

How will L&I promote and assist voluntary compliance with the ergonomics rule?

The long implementation timeline was designed to promote voluntary compliance with the rule. Depending on the type and size of business, employers will have 2-5 full years for voluntary activities before any enforcement begins. L&I will work with employers and employees to:

1. Develop Ergonomics Guides and Models: L&I has begun work with a “toolbox” committee to develop model ergonomics awareness education materials.
2. Identify Industry "Best Practices": As noted in the rule, industry best practices may be used to demonstrate employer compliance. Department ergonomists have begun work with several industry associations in the development of best practices, and are working to encourage other employer groups to develop best practices.
3. Establish Inspection Policies and Procedures: The department will involve employer and employee groups to develop, test and communicate these policies and procedures.
4. Conduct Demonstration Projects: L&I will work with employer and employee groups during the phase-in period to develop and test guidelines, best practices and other technical assistance materials.
5. Provide Information on Ergonomics: The department will collect and share examples of job hazard analysis, hazard controls, and training information. To the extent possible, information will be tailored to specific industry sectors. Special efforts will be made to share useful information with the small business community.

The department will discuss these activities regularly with the WISHA Advisory Committee. This Committee has identified the prevention of WMSDs as a top statewide safety and health priority.

L&I consultants and technical support staff will be available to assist employer and employee groups on voluntary compliance activities. Consultations are available statewide, especially for small businesses. Partnerships and demonstration projects with business and labor associations will be emphasized as a way of reaching as many employers and employees as possible. The annual Governor's Safety and Health Conference will feature topics on workplace ergonomics and the ergonomics rule.

The Safety and Health Impact Grant program recently approved by the legislature will also be an option for organizations to fund and promote voluntary compliance activities related to ergonomics. This new grant program provides up to $5 million dollars annually to fund activities promoting safety and health. Grants may be awarded for education and

training, technical innovation, best practices, and statewide priorities established by the WISHA Advisory Committee.

How will L&I evaluate whether the ergonomics rule achieves the purpose for which it was adopted, including use of interim milestones and objectively measurable outcomes?

The effectiveness of the rule will be evaluated using two primary tools. The first will be a periodic review of workers' compensation claims for WMSDs. This will examine the frequency, incidence rate, severity rate, cost, and industry distribution of non-traumatic soft tissue musculoskeletal disorders. The severity, number, and costs associated with these claims should decline over time if the rule is effective. These reviews will be conducted by the department's safety and health research program, SHARP. SHARP has established methods for such reviews and has done them in the past.

The second tool to measure effectiveness will be a periodic survey of employers to gather data on employers' perceptions about WMSDs, workplace risk factors, and steps they have taken to prevent WMSDs. Employer actions to recognize WMSD risk factors and hazards, and prevent hazards should increase over time if the rule is effective. The surveys will be designed and analyzed by the department's safety and health research program, SHARP. SHARP has established methods for such surveys and has conducted them in the past.

L&I will also evaluate data from WISHA consultation visits and compliance inspections. This will focus on the number and/or quality of interventions to reduce ergonomic hazards, and any roadblocks that employers are experiencing in reducing these hazards.

Coordination with OSHA (RCW 34.05.328 (1h))

Before adopting this rule the Department must coordinate the rule, to the maximum extent practicable, with other federal, state and local laws applicable to the same activity or subject matter. However, no federal, state, or local laws regulate or are truly applicable to the "same activity or subject matter" as these rules. Therefore, RCW 34.05.328 (1) (h) does not directly apply to this rule making in that there are not other rules or laws to "coordinate." However, as noted above, to the extent that this rule could theoretically require an employer to violate another state, local, or federal rule, the feasibility limitations built into this rule assure automatic "coordination" with the other rule or law.

The only arguably applicable law is the Occupational Safety and Health Act. This act defines the relationship between federal and state occupational safety and health agencies, including the relationship between federal and state rule making. The OSH Act requires approved state plan standards to be as-effective-as Federal standards adopted under the OSH Act in requiring employers to provide both employment and places of employment that are safe and healthful. The OSH Act also states that any approved state plan agency may assert jurisdiction over a safety and health issue with respect to which

no standard is in effect under OSH Act section 6. At this time the hazards covered by this rule have not been addressed in standards promulgated under the OSHAct. Therefore there are not limitations or restrictions placed on the Department by the Federal government with respect to adoption of the proposed state standards.

L&I's occupational safety and health program functions under the jurisdiction and oversight of federal OSHA. As part of this relationship L&I meets regularly with regional and national OSHA representatives and provides regular written reports to OSHA on its activities and plans. OSHA formally expresses any concerns in its annual written oversight report. L&I has kept OSHA fully informed on its plans and progress with regard to this rulemaking. OSHA has stated publicly and privately that if and when there is a federal ergonomics rule it will make a formal determination of whether any corresponding WISHA rule is at least as effective. At this time there is no such determination to be made and OSHA has conveyed no concern to L&I about this rulemaking. L&I has therefore coordinated with the federal government to the maximum extent practicable.

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